

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 274 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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KARIMBHAI CHHOTUBHAI SIPAI

Versus

STATE OF GUJ

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Appearance:

MR SG UPPAL for Petitioner

A.J.DESAI, ASST.PUBLIC PROSECUTOR for Respondent No. 1

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CORAM : MR.JUSTICE N.J.PANDYA and

MR.JUSTICE R.BALIA.

Date of decision: 25/09/96

ORAL JUDGEMENT

(N.J.Pandya, J)

1. The appellant has been convicted by the learned Additional Sessions Judge, Gondal in Sessions Case No. 57 of 1991 for offences under Section 20(b)22 of the NDPS

Act, read with Section 66(1)-b of the Bombay Prohibition Act, by an order dated 18.2.1992. After recording his finding of guilt, the said learned Judge has awarded rigorous imprisonment for ten years and has imposed a fine of Rs.1.00 lakh and in default has awarded six months rigorous imprisonment and for the offence under the Bombay Prohibition Act, a fine of Rs.500 has been imposed and in default, the accused is ordered to undergo imprisonment for fifteen days.

2. The main question urged before us on behalf of the accused appellant is that the requirement of Section 50 of the NDPS Act has not been fulfilled. The requirement relates to the right given to the accused of being searched at his option either by a gazetted officer or by a Magistrate. Before he can exercise, obviously, the accused is required to be informed of his right by the officer heading the raid party.

3. In the instant case, the raiding party was led by P.S.I. Shri Dhilon, who has been examined at Exh.17 paper book page 34.

4. As per his deposition on 3.7.1991, when he was in Upleta police station at about 7.30 in the evening he received information that an externee has come back under breach of the externment order and is sitting in grave yard on the outskirts of Upleta town. He therefore called panchas and along with the police party went to grave yard where he found a person running away. He was caught hold of and when search was carried out in presence of panchas, four small pellets which appeared to be that of charas were recovered. Usual formalities of seizure was carried and finally charge sheet was filed leading to the aforesaid conviction. Nowhere in the deposition of the said witness (Exb 17) P.S.I. Shri Dhilon there is any reference to the provisions of Section 50 of the NDPS Act. It is not the case at all that the accused was informed of there being an option of accused being searched either by a gazetted officer or a magistrate.

5. Learned advocate Shri Uppal appearing for the appellant has relied on AIR 1994 SC 1872 in the case of State of Punjab vs. Balvantsinh. There in paragraph 26 read with 17 and 21, the Supreme Court has held that the provisions of Section 50 are mandatory.

6. This judgement alone may leave some room for doubt as to whether the prosecuting agency can fall back upon proceedings of Section 114 of the Evidence Act and

more particularly, it illustration E. However, this question has been dealt with now by the Honourable Supreme Court in the case of Saiyad Mohd. Saiyad Umar Saiyad and others vs. State of Gujarat 1995(3) SCC 610. Dealing with the criminal appeal the High Court did say that presumption under section 114, Illustration E of the Evidence Act may be drawn. However, adhering with this view, the Honourable Supreme Court of India in no uncertain terms has held in para 10 of the judgement at page 615 that this presumption is not available.

7. Further amplifying on this point, the learned Judge has observed in the judgement that looking to the underlying idea of making provision like Section 50 of the NDPS Act when the burden is on the accused to explain possession, the safeguard incorporated in the provisions of Section 50 has to be strictly complied with and therefore it is for the prosecuting agency to establish that it has been so done.

8. Under the circumstances, presumption available under Section 114 read with Illustration E of the Evidence Act, 1872 is not available. This is the clear finding of the Honourable Supreme Court of India. In view of this decision when there is total silence in the evidence led by the prosecuting agency before the trial court on this point, the submission made by the learned advocate Shri Uppal is to be accepted.

9. As a result, the appeal is allowed. The order of conviction is set aside. The appellant-accused is ordered to be set at liberty forthwith, if not required for any other purpose. Fine, if paid, is ordered to be refunded.

(N.J. Pandya, J)

25.9.1996 (Rajesh Balia, J)

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